Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-122 OF 1995
SHAIK DAUD, SITI NORMA YAAKOB AND AHMAD FAIRUZ JJCA
14 NOVEMBER 1996

Labour Law *— Employment — Probationer — Whether a probationer is a workman within the meaning of s 20(1) of the Industrial Relations Act 1967 — Whether Industrial Court has jurisdiction to determine whether the dismissal of a probationer was with just cause or excuse — Industrial Relations Act 1967 s 20(1)*

The appellant joined the services of the respondent in May 1991 as an administrative assistant and was placed on three months' probation. At the end of her probationary period, she was dismissed on the ground that she had 'not met the standard requirements for confirmation'. She contended that she was unfairly dismissed and her representation was referred to the Industrial Court under s 20(3) of the Industrial Relations Act 1967 ('the Act'). The Industrial Court concluded that her dismissal was without just cause or excuse and awarded her compensation of nine months arrears of salary. In the High Court, the respondent contended that the appellant, being a probationer, was not a workman within the meaning of s 20(1) of the Act and, therefore, the Industrial Court had no threshold jurisdiction to entertain her representation. The High Court allowed the application for certiorari and quashed the award of the Industrial Court. The appellant appealed. The issue before the court was whether the appellant, a probationer, was a workman within the meaning of s 20(1) of the Act.

Held, allowing the appeal:

Although the word 'probation' or 'probationary' was not found in the definition of workman in s 2 of the Act, the word 'apprentice' was mentioned in the section and an apprentice would normally be a probationer. Therefore, employees on probation would come within the purview of s 20(1) of the Act and the Industrial Court would have jurisdiction to hear and determine whether the dismissal of the appellant was with just cause or excuse. Consequently, an employee on probation would enjoy the same rights as a permanent or confirmed employee and, therefore, his or her services could not be terminated without just cause or excuse. In the same way, the requirement of bona fides was essential in the dismissal of an employee on probation. However, if the dismissal or termination was found to be a colourable exercise of the power to dismiss or was a result of discrimination or unfair labour practice, the Industrial Court would have the jurisdiction to interfere and to set aside such dismissal. In the present case, the High Court judge erred in law in holding that the Industrial Court did not have threshold jurisdiction to entertain the appellant's case (see pp 379F, H–I and 380A); *V Subramaniam & Ors v Craigielea Estate* [1982] 1 MLJ 317 followed.

A [**Bahasa Malaysia summary**

Perayu menyertai perkhidmatan penentang dalam bulan Mei 1991 sebagai pembantu tadbir dan diletakkan di bawah tiga bulan percubaan. Pada akhir tempoh percubaannya, beliau telah dipecat atas alasan bahawa beliau 'tidak memenuhi kehendak pengesahan'.
B Perayu menegaskan bahawa beliau telah dipecat secara tidak adil dan representasinya telah dirujukkan kepada Mahkamah Perusahaan di bawah s 20(3) Akta Perhubungan Perusahaan ('Akta tersebut'). Mahkamah Perusahaan memutuskan bahawa pemecatan perayu adalah tanpa sebab atau alasan yang adil dan mengawardkan pampasan
C tunggakan gaji selama sembilan bulan. Di Mahkamah Tinggi, penentang menegaskan bahawa perayu yang merupakan seorang dalam percubaan bukan seorang pekerja dalam ertikata s 20(1) Akta tersebut dan oleh itu Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk melayani representasinya. Mahkamah Tinggi membenarkan permohonan untuk certiorari dan membatalkan award
D Mahkamah Perusahaan. Perayu membuat rayuan. Isu di hadapan mahkamah adalah sama ada perayu, seorang dalam percubaan, adalah seorang pekerja dalam ertikata s 20(1) Akta tersebut.

Diputuskan, membenarkan rayuan:

E Walaupun perkataan 'percubaan' tidak didapati dalam tafsiran pekerja dalam s 2 Akta tersebut, perkataan 'perantis' disebutkan dan seorang perantis biasanya adalah seorang dalam percubaan. Oleh yang demikian, pekerja-pekerja dalam percubaan termasuk di dalam skop s 20 Akta tersebut dan Mahkamah Perusahaan mempunyai bidang
F kuasa untuk mendengar dan menentukan sama ada pemecatan perayu adalah dengan sebab atau alasan yang munasabah. Ekoran itu, seseorang pekerja dalam percubaan mempunyai hak-hak yang sama seperti pekerja tetap atau pekerja yang telah disahkan dan perkhidmatan beliau tidak boleh ditamatkan tanpa sebab atau alasan yang munasabah. Dalam cara yang sama, keperluan bona fide adalah
G penting dalam pemecatan seorang pekerja dalam percubaan. Namun demikian, jika pemecatan atau pemberhentian didapati merupakan suatu gambaran pelaksanaan kuasa untuk memecat atau sebagai akibat daripada diskriminasi atau amalan buruh yang tidak adil, Mahkamah Perusahaan mempunyai bidang kuasa untuk campur
H tangan dan untuk mengetepikan pemecatan sedemikian. Dalam kes ini, hakim Mahkamah Tinggi telah melakukan kesilapan undang-undang dalam memutuskan bahawa Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk mempertimbangkan kes perayu (lihat ms 379F, H–I dan 380A); *V Subramaniam & Ors v Craigielea Estate*
I [1982] 1 MLJ 317 diikut.

Notes

For cases pertaining to probationers, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 740–741.

Cases referred to

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

V Subramaniam & Ors v Craigielea Estate [1982] 1 MLJ 317 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 2, 20(1), (3)

Appeal from: Originating Motion No R2–25–50–94 (High Court, Kuala Lumpur)

LG Seah (*Lobo & Associates*) for the appellant.
A Ramadass (*Ramadass & Associates*) for the respondent.

Cur Adv Vult

Shaik Daud JCA (delivering the judgment of the court): The High Court allowed an application by the respondent for certiorari and quashed the award of the Industrial Court on the ground that that court lacked jurisdiction.

The appellant joined the services of the respondent on 2 May 1991 as an administrative assistant and was placed on three months' probation. At the end of her probationary period on 31 July 1991, she was dismissed on the ground that she had 'not met the standard requirements for confirmation'. She contended that she was unfairly dismissed and her representation was eventually referred to the Industrial Court under s 20(3) of the Industrial Relations Act 1967 ('the Act') by the Minister of Human Resources.

After hearing evidence from both the appellant and the respondent, the Industrial Court concluded that her dismissal was without just cause or excuse, but instead of ordering reinstatement as prayed for, the court awarded her compensation of nine months arrears of salary.

In the High Court, the respondent contended that the appellant being a probationer was not a workman within the meaning of s 20(1) of the Act and that therefore the Industrial Court had no threshold jurisdiction to entertain her representation. This stand was never taken by the respondent in the Industrial Court itself. The High Court agreed with the respondent's contention and allowed the application for certiorari and quashed the award of the Industrial Court.

The issue before the High Court and this court is whether the appellant, a probationer, is a workman within the meaning of s 20(1) of the Act. Section 2 of the Act defines 'workman' to be:

> ... any person, including an apprentice employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a

consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

Whether the Industrial Court has jurisdiction to hear a representation of a worker on probation came to be decided in *V Subramaniam & Ors v Craigielea Estate* [1982] 1 MLJ 317. The facts of the case differ slightly from those of the present case, but the issue is the same, ie it concerns a representation made by a probationer. In that case, the appellants were employed on probation by the respondent estate. At the end of their probationary period, they were neither confirmed nor dismissed, but they carried on in their services. They took part in a strike organized by the union to which they belonged and, in doing so, they were absent from their work. The respondent estate informed them that as they had been absent from their work without lawful or reasonable excuse for more than two consecutive days, the estate had terminated their employment. The matter was referred eventually to the Industrial Court. The Industrial Court made a finding that their dismissal was without just cause or excuse and ordered their reinstatement as confirmed in their appointments, presumably because their period of probation was over. The respondent estate applied for an order of certiorari and the High Court held that the Industrial Court had no jurisdiction to hear the appellants' representations, and made an order quashing the award. On appeal to the Federal Court it was held that the Industrial Court had jurisdiction to hear and determine the issue, ie whether the dismissal of the appellants were with just cause or excuse. Having arrived at that decision, the Federal Court, allowed the appeal and restored the Industrial Court's award save that the employees be reinstated only as trainees or on probation. We are of the view that the implication of this decision is employees on probation come within the purview of s 20(1) of the Act and that the Industrial Court has jurisdiction. It is conceded that the word 'probation' or 'probationary' is not found in the definition of workman in s 2 of the Act, but the word 'apprentice' is mentioned and an apprentice to our mind would normally be a probationer, as was held in *V Subramaniam*'s case. The Act, being a piece of social legislation, should be given a broad and liberal interpretation (see *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481). It is unfortunate that the High Court never discussed or even considered *V Subramaniam*'s case although the records show that it was cited in arguments by both counsels before it. Instead, the court chose to consider and rely on a number of the Industrial Court rulings, which, with respect, are not binding on the High Court.

It is our view that an employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of bona fides is essential in the dismissal of an employee on probation, but if the dismissal or termination is found to be a colourable exercise of the power to dismiss or is a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and to set aside such dismissal. In the present case, we find that the Industrial Court made a finding of fact that the dismissal of the appellant was without just cause or excuse.

In the circumstances, we find that the learned judge erred in law in holding that the Industrial Court has no threshold jurisdiction. We allowed the appeal with costs, set aside the order of the High Court, restored the award of the Industrial Court, and ordered the deposit to be refunded to the appellant.

Appeal allowed.

Reported by Jafisah Jaafar